IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. [redacted]

COOPER STEVEDORING COMPANY,

Petitioner

v.

FRITZ KOPKE ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX OF AUTHORITIES

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To The Honorable The Chief Justice and The Associate Justices of The Supreme Court of The United States:

Petitioner, Cooper Stevedoring Company, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case.

OPINION BELOW

The district court did not prepare a written opinion. Its findings of fact and conclusions of law were announced from the bench at the conclusion of the trial, and the transcript of those findings, as reproduced on pp. 186-196 of the

Appendix filed in the Court of Appeals, is attached hereto as Exhibit B. The opinion of the United States Court of Appeals for the Fifth Circuit, as modified on rehearing, is reported at 479 F.2d 1041. The original opinion of the Court and the modification on rehearing is reproduced in Appendix A to this Petition.

JURISDICTION

The original opinion of the Court of Appeals was rendered on July 1, 1973. The opinion was modified and rehearing denied in other respects on August 6, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Is there a right of contribution in non-collision maritime cases?

STATEMENT OF THE CASE

The original plaintiff, Troy Sessions, was injured when he was working as a longshoreman in the Port of Houston aboard the SS KARINA, a vessel owned and operated by respondent, Fritz Kopke, Inc. and under time charter to respondent Alcoa Steamship Company (hereinafter collectively referred to as the "vessel"). Sessions was injured as he walked on top of palletized crates of cargo that had previously been loaded aboard the vessel in Mobile by petitioner Cooper Stevedoring Company. Sessions stepped into an opening between two crates, which was concealed by a piece of paper.

The vessel brought an action for indemnity against Sessions' employer, Mid-Gulf Stevedores, Inc., and against

Cooper, alleging that the stevedores breached their implied warranties of workmanlike performance owing to the vessel. See *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). Sessions did not sue Cooper directly. Shortly before the trial, Mid-Gulf took over the defense of the vessel, agreeing to indemnify the vessel fully. Mid-Gulf was then dismissed, and its attorneys were substituted as attorneys for the vessel.

After a trial to the court sitting without a jury, the district court found that the vessel was unseaworthy, that the vessel owner and Cooper were negligent, that the vessel was not entitled to obtain indemnity from Cooper because it was guilty of conduct sufficient to preclude indemnity, but that the vessel was entitled to contribution against Cooper for one-half of the damages awarded to Sessions against the vessel. Judgment in favor of Sessions was satisfied by Mid-Gulf, which had agreed to indemnify the vessel.

Cooper appealed, arguing that it was improper for the court to award the vessel contribution. The vessel (through attorneys for Mid-Gulf) cross-appealed, contending that the vessel was entitled to indemnity from Cooper. The Court of Appeals affirmed, holding: (1) that the district court's findings of conduct sufficient to preclude indemnity were not clearly erroneous, and (2) that under previous decisions of the Fifth Circuit contribution was properly allowed.

REASON FOR GRANTING THE WRIT

The Fifth Circuit's decision in allowing contribution in this non-collision admiralty case is in direct conflict with this Court's decisions in Atlantic Coast Line R. Co. v. Erie Lackawanna R. Co., 406 U.S. 340 (1972) and Halycon Lines et al v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952).

In *Atlantic Coast Line R. Co.* v. *Erie Lackawanna R. Co.*, this Court held:

> "We agree that in this noncollision admiralty case the District Court properly dismissed petitioner's third party complaint for contribution against respondent Erie on the authority of *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U.S. 282 (1952)." 406 U.S. at 340.

It is undisputed this is a non-collision admiralty case. In granting contribution in the face of *Atlantic*, the Court of Appeals for the Fifth Circuit relied upon its decisions prior to *Atlantic* which had held that the *Halcyon* rule was inapplicable "where the joint tort feasor against whom contribution is sought is not immune from tort liability by statute." See *Horton & Horton, Inc.* v. *T./S. J. E. Dyer*, 428 F.2d 1131 (5th Cir. 1970) cert. denied 400 U.S. 993 (1971); *Watz* v. *Zapata Offshore Company*, 431 F.2d 100 (5th Cir. 1970).*

The decisions by the Fifth Circuit in *Horton*, *Watz* and now in this case create a right of contribution in non-collision admiralty cases in direct contravention of both the rationale of this Court's decision in *Halcyon* and the precise holdings in *Atlantic* and *Halcyon*. The entire basis of the *Halcyon* decision was that:

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* The Second Circuit in *In Re Seaboard Shipping*, 449 F.2d 132 (1971), cert. denied 406 U.S. 949 (1972) followed *Horton* and *Watz* in a decision rendered before this Court's decision in *Atlantic*. This Court denied certiorari in *Seaboard* shortly after the *per curiam* decision in *Atlantic*.

". . . it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await Congressional action." 342 U.S. at 285."

This Court said in the *Halcyon* case:

"In the absence of legislation, courts exercising a common-law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors. . . .

". . . Congress has already enacted much legislation in the area of maritime personal injuries. . . . Many groups of persons with varying interests are vitally concerned with the proper functioning and administration of all these Acts as an integrated whole. We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups. The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run. . . . Should a legislative inquiry convince Congress that a right to contribution among joint tortfeasors is desirable, there would still be much doubt as to whether application of the rule or the amount of contribution should be limited by the Harbor Workers' Act, or should be based on an equal division of damages, or should be relatively apportioned in accordance with the degree of fault of the parties.

"In view of the foregoing, and because Congress while acting in the field has stopped short of approving the rule of contribution here urged, we think it would be inappropriate for us to do so." 342 U.S. at 285-7.

The *per curiam* decision in *Atlantic* was expressly based "on the authority" of *Halcyon,* which can only mean that this Court was reaffirming the rationale of *Halcyon* as well as the holding of the Court on the facts before it.

If the reasoning of the *Halcyon* case had sufficient force to form a basis for this Court's opinion in *Atlantic,* that reasoning should have equal force now.

In 1972 the Congress did adopt substantial changes in the Longshoremen's and Harborworkers' Compensation Act.* Section 18(a) of the 1972 Act amended Section 5(a) of the Act (33 U.S.C. § 905) in a manner which substantially alters the rights of an injured longshoreman to recover damages from the vessel and further provides that "the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void." The continuing legislative interest of the Congress in this area of the law underscores the original wisdom of the *Halcyon* reasoning as reaffirmed in *Atlantic.* The legislative process which led to the enactment of the 1972 Act involved just the sort of interaction of "many groups of persons with varying interests," and the Congressional action involved "a fair accommodation of the diverse but related interests of these groups." 342 U.S. at 286. Congress can be presumed to have enacted this legislation with full appreciation of this Court's decisions in *Halcyon* and *Atlantic,* and thus this Court and the lower courts should be even more reluctant now to intervene in this area of substantial *statutory involvement. Cf. Flood* v. *Kuhn,* 407 U.S. 258 1972); *Apex Hosiery* v. *Leader,* 310 U.S. 469, 487-9 (1940); *Sibbach* v. *Wilson & Co.,* 312 U.S. 1, 15-18 (1941); *Joseph* v. *Carter & Weekes Co.,* 330 U.S. 422, 428 (1947); *Walling* v. *Halliburton Oil Well Cementing Co.,* 331 U.S. 17, 25-26 (1947).

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* Even if those amendments had become effective before this accident, the outcome of this case would not have been directly affected by the Act, since the plaintiff recovered against the vessel for negligence, and the vessel's indemnity/contibution claim against the Mobile stevedore was not against an "employer" under the Act.

The Fifth Circuit's decision in this case, of course, attempts to distinguish *Halcyon* and *Atlantic*. That distinction, based upon *Horton* and *Watz* which were decided by the Fifth Circuit before *Atlantic*, is that there is no prohibition against contribution "where the joint tort feasor against whom contribution is sought is not immune from tort liability by statute." This "distinction" is not based upon any language or reasoning in either *Halcyon* or *Atlantic*. On the contrary, in *Atlantic* this Court was careful to point out that the case was a "non-collision" admiralty case. That statement can only mean that for purposes of determining whether or not there is a right of contribution in admiralty, there are two kinds of cases: collision cases and non-collision cases. In collision cases there has long existed a rule of contribution through the divided damages rule, and this rule long preceded any legislative activity in the area. In non-collision cases there was no such right before *Halcyon* and none thereafter until *Horton* and *Watz*. If this Court in *Atlantic* wanted to leave standing the *Horton-Watz* exception to the *Halcyon* rule, this Court would not have referred to the case as a "non-collision admiralty case."

The *Horton-Watz* exception to the *Halcyon* rule also does not survive the precise holding of *Atlantic*. Not only does the rationale of *Halcyon* have continuing vitality which would be completely undermined by adoption of the *Horton-Watz* exception, but a careful consideration of the facts before the Court in *Atlantic* shows that *Horton* and *Watz* are overruled because the party against whom contribution was sought was not statutorily immune from direct action by the plaintiff. The original plaintiff, Benazet, an employee of Erie, was injured while working on a box car owned by Atlantic. At the time of the accident the boxcar was located on a barge owned by Erie which was moored in the Hudson River in New York harbor. Benazet sued and recovered

against Atlantic on a negligence theory. He did not sue his employer, Erie, since, as the district court noted (315 F.Supp. 357 at 364, footnote 4), he was covered by the Longshoremen's and Harborworkers' Compensation Act. In *Pennsylvania R. Co.* v. *O'Rourke*, 344 U.S. 334 (1953), this Court held that a "railroad employee's remedy was under the Harborworkers' Act exclusively and not under the F.E.L.A." But Benazet's disability from suing Erie for *negligence* does not mean that he could not have sued Erie, as the vessel owner, for *unseaworthiness*. The district court said:

> "Since *O'Rourke*, however, longshoremen, covered by the Harbor Workers' Act, have been permitted to sue their own employer, where that employer is also the shipowner, for unseaworthiness, despite the provision of the Harbor Workers' Act that the liability of an employer under the Act 'shall be exclusive and in place of all other liability.' See *Jackson* v. *Lykes Bros. Steamship Co.*, 386 U.S. 731, 87 S.Ct. 1419, 18 L.Ed. 2d 488 (1967). Although plaintiff Benazet is not a longshoreman, the Supreme Court's reliance in *Jackson* on its expansive grant of the benefits of the seaworthiness doctrine to a wide range of maritime employees combined with its announced desire to avoid a 'harsh and incongruous result' leads us to conclude that *this plaintiff would probably be entitled to maintain a suit based on unseaworthiness of the carfloat owned by his employer Erie.*" 315 F.Supp. at 364, ftne 4. (Emphasis added)

Thus, the district court in *Atlantic* assumed that the party against whom contribution was sought was *not* immune by statute from direct suit by the plaintiff. The district court's reading of the effect of *Jackson* v. *Lykes* upon *O'Rourke* is correct and is further supported by *Reed* v. *The Yaka*, 373 U.S. 410 (1963). The *O'Rourke* case was a 5-4 decision, with Justices Warren, Black, Clark and

Minton dissenting. The decision was written by Justice Reed, who was one of the dissenters in *Halcyon*. Justice Black's view became the majority, however, and he wrote the decisions in *Jackson* v. *Lykes* and *Reed* v. *Yaka*, with Justices Stewart and Harlan dissenting. Although *O'Rourke* has never been expressly overruled by this Court, it has not been cited by this Court since *Reed* v. *Yaka*, and it is obvious that the views of the minority in *O'Rourke* became law in the later decisions.

This Court need not overrule *O'Rourke* in order to reach the result urged by petitioner. By the same token, however, *O'Rourke* need not be expanded in such a way as to undermine the legitimate breadth of *Atlantic*. A fair reading of all of the decisions of this Court culminating in *Atlantic* leads to the inescapable conclusion that the *Atlantic* case means exactly what it says: "There is no right of contribution in non-collision admiralty cases" — irrespective of the right of the plaintiff to bring a direct action against the party against whom contribution is being sought.

This Court should grant certiorari to decide this question if for no other reason than to eliminate the confusion which currently exists in the lower courts. At least one court has refused to follow *Horton-Watz* subsequent to *Atlantic*. See, *Coggins* v. *James W. Elwell & Co.*, 356 F.Supp. 612 (E.D.Pa. 1973). Other lower courts refused to follow *Horton* and *Watz* before this Court's decision in *Atlantic*. See, *In Re Standard Oil Company of California*, 325 F. Supp. 388 (N.D.Calif. 1971); *Sears Roebuck & Co.* v. *American President Lines, Ltd.*, 345 F.Supp. 395 (N.D. Calif. 1971); *Nickert* v. *Pugget Sound Tug & Barge Co.*, 335 F.Supp. 1158 (W.D.Wash. 1972). One district court decision in the Fifth Circuit allowed "contribution" in the sense of an equitable apportionment of damages, not a 50% contribution. *Houston-New Orleans, Inc.* v. *Page Engineering Co.*, 353 F.Supp. 890 (E.D.La. 1972).

CONCLUSION

For the foregoing reasons a Writ of Certiorari should be issued from this Court to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this the 31 day of October, 1973, a true and correct copy of the foregoing Petition for Writ of Certiorari was forwarded to counsel for respondents, Messrs. Dixie Smith and H. Lee Lewis, Jr. of Fulbright, Crooker and Jaworski, at Bank of the Southwest Building, Houston, Texas, 77002.

B D McKinney

Joseph D. Cheavens

EXHIBIT A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-1467

TROY M. SESSIONS,

Plaintiff-Appellee,

v.

FRITZ KOPKE, INC., ET AL,

Defendants-Third Party Plaintiffs-Appellees and Cross Appellants,

v.

COOPER STEVEDORING COMPANY, INC.,

Third Party Defendant-Appellant and Cross Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

(June 1, 1973)

Before MORGAN, CLARK and INGRAHAM, Circuit Judges.

INGRAHAM, Circuit Judge: The SS KARINA, a vessel owned and operated by Fritz Kopke, Inc., and under charter to the Alcoa Steamship Company, was loaded with palletized crated cargo by the employees of Cooper Stevedoring Company at Mobile, Alabama. The KARINA departed Mobile and arrived at Houston on or about July 2, 1969, where employees of Mid-Gulf Stevedores, Inc., prepared to load sacked cargo.

Troy Sessions, a longshoreman employed by Mid-Gulf, was one of the first men to enter the hold of the ship. The Mid-Gulf employees were required to walk atop the previously loaded palletized crates in order to store the cargo they were bringing aboard ship. Sessions stepped into an opening between two crates which was concealed by a covering of corrugated paper, and thereby sustained certain personal injuries.

Sessions brought an action against Fritz Kopke and the Alcoa Steamship Company (collectively referred to as the vessel) seeking to recover damages for his injuries. The vessel in turn sought indemnity against Mid-Gulf and Cooper. Prior to trial the vessel compromised and settled its claim against Mid-Gulf, which was then dismissed from the suit. After a trial to the court, sitting without a jury, the vessel was found to be unseaworthy and damages were awarded to the plaintiff in the amount of $38,679.90. No one appeals from this award. The court found that Cooper had negligently stowed the cargo it loaded in Mobile and had thus breached the warranty of workmanlike performance it owed to the vessel. Denying the vessel's claim for a full indemnity, the court awarded the vessel contribution from Cooper as a joint tort-feasor for 50% of the damages.

Cooper appeals. The vessel cross-appeals, contending that there was no basis for the trial court's denial of

its claim to full indemnity from Cooper. While our appellate review of this case is made somewhat difficult by the fact that neither the vessel nor Cooper requested that the trial court make formal findings of fact or conclusions of law which specifically dealt with the various rights and liabilities of the parties, nevertheless, we find ample basis for this holding in the oral decision announced by the judge at the conclusion of the case. Fairly read, the holding does makes it clear that the court considered the vessel's conduct precluded its full recovery on the indemnity claim because it failed to fulfill its primary responsibility under its arrangement with Cooper to assure that some type of dunnage was placed on top of the cargo. On the record before us we cannot conclude that this finding was clearly erroneous.

On its appeal Cooper Stevedoring asserts that the trial court's award of contribution in a non-collision maritime case is in direct conflict with the Supreme Court's decisions in *Halcyon Lines, et al* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), and *Atlantic Coast Line R. Co.* v. *Erie Lackawanna R. Co.*, 406 U.S. 340 (1972).

Halcyon, supra, held that there was no right to contribution between a shipowner and a shoreside contractor who are joint tort-feasors in a case involving injuries to an employee of the contractor while engaged in repair work on a ship. The apparent prohibition against contribution in a non-collision maritime case has been held inapplicable where the joint tort feasor against whom contribution is sought is not immune from tort liability by statute. *Horton & Horton, Inc.* v. *T/S J. E. Dyer,* 428 F.2d 1131 (5th Cir., 1970), cert. den. 400 U.S. 993 (1971); *Watz* v. *Zapata Offshore Company,* 431 F.2d 100 (5th Cir., 1970); *In re Seaboard Shipping,* 449 F.2d 132 (2nd Cir., 1971), cert. den. 406 U.S. 949 (1972).

In the present case Sessions, in addition to suing the vessel, could have proceeded directly against Cooper Stevedoring as Cooper was not his employer and, therefore, not shielded by the limited liability of the Longshoremen and Harbor Workers Act.

The Supreme Court's per curiam affirmance of the *Atlantic* case, *supra*, in no way necessitates a reexamination of our prior holdings. An examination of the district court's opinion in that case (reported at 315 F.Supp. 357 [1970]) indicates that the employer against whom contribution was sought enjoyed statutorily imposed limited liability and, therefore, would have fallen without our *Horton-Watz* exception to the *Halcyon* rule.

Finding both parties' additional assertions of error without merit, we therefore AFFIRM the judgment of the district court.

AFFIRMED.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-1467

TROY M. SESSIONS,

Plaintiff-Appellee,

v.

FRITZ KOPKE, INC., ET AL,

Defendants-Third Party Plaintiffs-Appellees and Cross Appellants,

v.

COOPER STEVEDORING COMPANY, INC.,

Third Party Defendant-Appellant and Cross Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING

(August 6, 1973)

Before MORGAN, CLARK and INGRAHAM,
Circuit Judges.

INGRAHAM, Circuit Judge: The court, having received a petition for rehearing in the above entitled and numbered cause, modifies its opinion of June 1, 1973, by deleting the eighth paragraph thereof. In its place the court substitutes the following paragraph:

> The Supreme Court's per curiam affirmance of the *Atlantic* case, *supra*, does not necessitate a reexamination of our prior decisions. It is unclear from the district court's opinion, 315 F.Supp. 357 (S.D.N.Y., 1970), as well as from the Second Circuit's affirmance thereof, 442 F.2d 357 (1971), whether our *Horton-Watz* exception to the *Halcyon* rule was even applicable under the facts of *Atlantic*. Moreover, neither court directly questioned the decisions in *Horton* and *Watz*. In these circumstances and absent a reference in the Supreme Court's short per curiam opinion to these decisions, we do not read *Atlantic* as silently overruling *Horton* and *Watz*.

In all other respects the petition for rehearing is DENIED.

EXHIBIT B

Mr. Sessions was working aboard the "S/S Karina" on July the 2nd, 1969. The "S/S Karina" was docked at the Manchester Docks [412] in the City of Houston and the work being undertaken on that day that Mr. Sessions was concerned with was the loading of bags of grits or rice or some similar type of product; that this loading operation was going on in the No. 1 hold of the "Karina"; that Mr. Sessions was working for the Midgulf Stevedoring Company.

The "S/S Karina" was owned and operated by Fritz Kopke, Inc. and/or the Alcoa Steamship Company; that the operations started at 10:00 o'clock; that Mr. Sessions and his gang were the first people to go down into the No. 1 hatch; that before the "Karina" docked in Houston, the "Korina" had been at the Port of Mobile where there was loaded into the No. 1 hatch sixty-eight palletized crates or bags of fire brick and furnace liner; that this weighed ninety-two tons; that all of it was loaded or stowed in the No. 1 hold in one tier; that these palletized crates had been loaded by the Cooper Stevedoring Company in Mobile; that there was no dunnage across the top of them; that the top was uneven; that the type of palletized crates are best described by pictures No. 11 and No. 10. The fire brick was like picture No. 10. The furnace liner was [413] like picture No. 11. From those, you can tell that certainly the top was not a smooth working surface; that in order to get down in the hold No. 1, you had to walk on top of this stow; that Mr. Sessions, in working and loading these sacks of grits or rice, or whatever they were, stepped into an opening between these palletized crates as he was carrying a sack weighing approximately a hundred pounds of grits; that as he fell, he wrenched his back to such an extent that it brought about a herniated disc between the L-5 and the L-4 inner spaces; that that condition resulted in an opera-

tion performed by Dr. Goodall where Dr. Goodall performed what is generally referred to as laminectomy. The result was good.

Mr. Sessions today is fifty-four years old. He had an annual earning capacity before the accident of approximately $6,500.00 a year; that as a result of this injury and the operation, he has been unable to work as he did work, since this accident, and has earned less money from the day of the accident till today on a yearly basis; that Dr. Goodall testified that through the exercises that he had given him, that there's [414] no reason why he should not have a recovery to his back where he would be able to continue to perform the work of a longshoreman; that because of the operation, it was his recommendation that he not perform any work that would require lifting of any object over seventy-five to a hundred pounds. Mr. Sessions is a longshoreman of considerable experience, having been a longshoreman since 1957. He has a double A seniority rating.

The testimony of Mr. Hocker, who is a longshoreman of long standing since 1934 and has a double gold star, is that a man in the Port of Houston with a double A rating should be able to and has been able to get key jobs, key jobs consisting of operating towmotors, being a hook-on man, a winch operator, et cetera.

The evidence would lead this Court to conclude that Mr. Sessions should be able to continue working as a longshoreman, not doing heavy work, but because of his seniority, should be able to get lighter work on a regular basis, but that he will have some disability as a result of this injury.

Dr. Tom Moore and Dr. Goodall [415] both testified that his efficiency, his ability to obtain and retain employment

as a longshoreman, should be reduced by something like fifteen percent.

I find that, with reference to the stow, that of course the ship has the primary responsibility, legally, of cargo stowage; that this type of stowage was stowed in the hold with nothing else in it; that some type of arrangements should have been conducted to assure that the stow would not, in its trip from Mobile to Houston, move so as to leave spaces between the crates an/or some type of dunnage should have been put on top of the stow, because it was obvious to anyone that in order to get down into the hold to stow other cargo, which it was obvious that other cargo was going to have to be stowed in that hold, you would have to walk over the crates that were stowed there. Consequently, the manner and method in which it was stowed brought about an unsafe place to work and brought about an unseaworthy condition on the part of the "Karina."

That Cooper Stevedoring Company was responsible for the stowage and that they [416] were negligent in not stowing this cargo in a manner and method in which people could safely walk on top of them, because it was obvious that other longshoremen in other ports would have to work on top of them. It is difficult from this evidence for the Court to evaluate exactly the responsibility between the shipowner on the one hand and Cooper on the other.

As an aside, the Midgulf Stevedores were dismissed from this case on the 14th day of October, 1971, and the ship took over the defense of the case on behalf of Midgulf and on behalf of the ship.

Mr. Harmon: Judge, I think it is the other way around.

The Court: Oh, Midgulf took over on behalf of the ship. That's correct. Well, no. Midgulf was dismissed.

Mr. Harmon: That's right, Judge, but that was after they had agreed to indemnify the ship, take over the defense.

The Court: According to the testimony of Mr. Smith, there was an agreement between the Mid-gulf and the ship that Midgulf would indemnify the ship against any loss.

[417] The evidence also indicates that for some unexplained reason there was a piece of paper, which has been described as approximately ten feet long and three to four feet wide, left on top of these boxes. And from all of the testimony, the Court can reach no conclusion other than that this piece of paper was over the space through which Mr. Sessions' foot slipped. Consequently, Mr. Sessions could not have seen the space because of the paper.

The evidence leads the Court to the conclusion that the piece of paper certainly wasn't put there by Midgulf, the stevedoring company in Houston. Midgulf had done nothing in the hold that day up until 10:00 o'clock when the hatch was first opened at 10:00 a.m. that morning, and Mr. Sessions' injury occurred sometime before noon.

There is no testimony to indicate that the Midgulf Stevedoring Company or the longshoremen employed by Midgulf brought any paper into the hold. Where the paper came from, the Court is unable to determine, whether it was left there by the Cooper people or whether it was left there by the ship personnel. But the fact of [418] the matter is it was there, apparently, because there's no other evidence but that it was there. The paper itself and the place on which it was brings about an unsafe condition in that it hid the space through which Mr. Sessions' foot slipped.

All of that, leads the Court to the conclusion that since the ship itself has a responsibility on cargo and Cooper

has a responsibility since they loaded it, and I can see nothing that would lead to any negligence on the part of Midgulf, that because of the unexplained presence of the paper, the Court comes to the conclusion the only thing to do is to divide the liability in this case equally among the ship and Cooper.

And that is what I find, that they are each fifty percent responsible for the injury to Mr. Sessions.

As to amount, it seems to the Court that for the pain and suffering in the past — I don't know how you arrive at that. You just have to do it through experience, I guess. It seems to me like $10,000 would be a reasonable sum of money for past pain and suffering.

[419] Pain and suffering in the future. Taking Dr. Goodall's testimony, taking the fact that from all the evidence in this case, reading Dr. Moore's report — the results of the surgery were good; there's nothing about the surgery that brought about anything that should cause any problem in the future — that although Mr. Sessions still complains of low back pain, and of course when you have an operation on the back the Court's own common experience from this and other cases leads him to the conclusion that it is reasonable to assume that some pain will remain with Mr. Sessions in the future, and I have allocated $5,000 for that.

Taking into consideration Mr. Sessions' past earnings, the earnings that he has had since the accident, what he has worked, taking into consideration the increases in hourly rates that have been granted to longshoremen during the intervening years, he has had about two and a half years of some loss of earnings from the date of the accident to the date of trial, and this Court concludes a total loss of earnings in the amount of $7,500.

As to future loss of earnings, [420] taking the fifteen percent loss of efficiency or loss of earning capacity or loss of ability to obtain and retain employment as a longshoreman, and taking his hourly wage and allocating twenty more years of productive life in this field to Mr. Sessions — he is now fifty-four years old, that would make him seventy-four; that's a little generous — but taking twenty years that means future loss of earnings of $14,625.

The medical is all in the pretrial order. It is apparently stipulated to it is $590 for Dr. Goodall, $718.90, Memorial Baptist, $86 to the Memorial Radiology Association, $32 to Lederer & Associates for laboratory work, Anesthesia, $78, and I believe Dr. Goodall testified that he had about $50 more or $75 more — fifty, wasn't it?

Mr. Oldham: Twenty-five to fifty, your Honor.

The Court: $50 more medical. And whatever that adds up to.

There is a lien in this case of Texas Employers' Insurance Company of $626.07 plus $361.25. What does that add up to?

Mr. Smith: Give me the figures again.

[421] The Court: Your Pretrial Order says $626.07 and $361.25. Whatever that total is will have to come off of the total of what we have added up here. I have not added up that total.

Mr. Oldham: $987.32.

The Court: How much?

Mr. Oldham: $987.32.

The Court: What does the medical come to?

Mr. Brock: That's the total comp and medical, isn't it?

Mr. Oldham: Yes, That is the total of both.

The Court: What do the medical bills add up to? I have not added them up. I have not added up $590 and those. I haven't added those up.

Mr. Oldham: Fifteen fifty-four ninety, I believe, your Honor.

The Court: Fifteen fifty-four ninety?

Mr. Oldham: Yes, your Honor.

The Court: If fifteen fifty-four ninety is the total medical — is that the total medical? — I find no future medical.

[422] Mr. Brock: I made no proof on it.

The Court: Is fifteen fifty-four ninety the amount? Do you want to agree on that? Is that the medical?

Mr. Oldham: That's the figure I got, adding up the figures you read out, sir.

Mr. Brock: Was how much?

The Court: Fifteen fifty-four ninety. So my calculations come to $38,679.90 and lien would have to come off of that or they get a judgment, Texas Employers' get a judgment for the lien, do they not, nine hundred and something?

Okay. Should I find anything else?

Mr. Smith: I think you should make a finding that Cooper breached its warranty of workmanlike service to the vessel owner by negligently stowing the —

The Court: Well, if I need to say that — I have said that they negligently stowed it, so that negligent stowage amounted to as a breach of their obligation to —

Mr. Smith: Stow the cargo in a workmanlike manner, which breaches the warranty of workmanlike service.

[423] The Court: Okay. The warranty of workmanlike service. And that will constitute the findings of fact and conclusions of law and the judgment of this Court unless somebody says I have to make other findings.

Now, what I will do, if anyone is going to appeal this case, I would request and order them to let me know, so that I can write this up in the form of a memorandum opinion. I will try not to make, if that happens, any additional findings that I have not made here, but I will dress it up in language in the form of a memorandum opinion and order.

Mr. Harmon: Judge, I would like to ask Mrs. Gavales, when she gets an opportunity, to write this up and let me have an opportunity to look at it. I have been trying to follow it very carefully and I think the Court has covered most points, but I would like to look at the Court's findings here.

The Court: All right. Are there any other findings that anybody thinks I ought to make that I have not made, that you can think of?

Mr. Harmon: Judge, in this regard, [424] I say I don't know, in view of the Court's findings about the paper and the fact that the Court was not favorable to find that Cooper Stevedoring Company —

The Court: I can't find who put the paper where it is. All I can find is the paper was there.

Mr. Harmon: I understand. The shipowner failed in his burden of proving that we put it there. This is why I say before I know I am going to want any other findings in regard to this, I want to look at this.

The Court: If anybody wants any other findings, let me know what it is. If you want to appeal, I want the opportunity — I don't want any mistake about it, because I got very mad in a case where I said this and I did this and the lawyers appealed it and I didn't know it. And what I call the idiotic Court of Appeals — and I'll say it on the record — reversed me saying I didn't make findings of fact and conclusions of law. And I had stated in the transcript that I was making findings of fact and conclusions of law and read it off, just like I did now, and they sent it back to me to make findings of fact and [425] conclusions of law.

So I got hot. I got hot with the lawyers not telling me they were going to appeal it, because the record is clear in the case. It said if they wanted to appeal it, let me know and I was going to dress up what I was going to do. Instead, we wasted a lot of time because, apparently, the Fifth Circuit didn't read it or if they read it, I didn't spell it out like, you know, I'm doing this in accordance with Rule 52(A).

Mr. Harmon: Yes, sir.

The Court: Okay.

Mr. Smith: Can we have an opportunity to review your findings?

The Court: Yes, sir. All right. We will stand adjourned.